

DATE: April 21, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12324

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 10, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations). Administrative Judge Thomas M. Crean issued an unfavorable security clearance decision, dated January 13, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by finding that some of Applicant's debts were still unresolved; (2) whether the Administrative Judge erred by taking into consideration Applicant's 1993 bankruptcy; and (3) whether the Administrative Judge failed to give due consideration to Applicant's employment history. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision).

In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge erred by finding that some of Applicant's debts were still unresolved. The Administrative Judge found the following: (a) Applicant had delinquent debts worth approximately \$14,750 that accrued after she had earlier debts discharged in bankruptcy in 1993; (b) Applicant had paid off two of her delinquent debts, reducing her indebtedness to approximately \$12,000; (c) Applicant was making payments on two other delinquent debts; and (d) Applicant had remaining debts worth approximately \$10,000. The Judge entered formal findings in favor of Applicant with respect to the debts covered by SOR paragraphs 1.c and 1.d,⁽¹⁾ and formal findings against Applicant with respect to the debts covered by SOR paragraphs 1.a, 1.b, 1.e, 1.f, 1.g, and 1.h.

On appeal, Applicant contends she submitted documentation showing that she satisfied all her debts except for the debts covered by SOR paragraphs 1.b and 1.e, and offers to resubmit that documentation if the Board wants.⁽²⁾ The Board construes Applicant's brief as raising the issue of whether the Administrative Judge erred by finding that Applicant had not resolved the debts covered by SOR paragraphs 1.a, 1.f, 1.g, and 1.h.

Considering the record as a whole, including the documentation submitted by Applicant during the proceedings below, the Board concludes the Administrative Judge had sufficient record evidence to find that Applicant still had outstanding balances for the debts covered by SOR paragraphs 1.a, 1.f, 1.g, and 1.h. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Applicant's brief also offers an explanation about the debts covered by SOR paragraphs 1.b and 1.e. On appeal, the Board does not re-try a case, but rather reviews the Administrative Judge's decision to determine whether the appealing party identifies factual or legal error. Applicant's proffered explanation about the debts covered by SOR paragraphs 1.b and 1.e does not identify any factual or legal error by the Judge.

2. Whether the Administrative Judge erred by taking into consideration Applicant's 1993 bankruptcy. Applicant does not challenge the Administrative Judge's finding that she had earlier debts discharged in bankruptcy in 1993. However, Applicant contends Title 11 of the U.S. Code prohibits employers from discriminating against a person who has filed for bankruptcy. The Board construes Applicant's contention as raising the issue of whether the Judge erred by taking into account Applicant's 1993 bankruptcy.

Section 525(b) of Title 11 of the U.S. Code prohibits a *private* employer from terminating the employment of, or discriminating with respect to employment against, an individual solely because the individual is or has been a debtor or bankrupt under the Bankruptcy Code. That provision of law does not help Applicant in the context of her security clearance case. The DoD is not a private employer, a security clearance decision is not an employment decision by Applicant's employer, and the security clearance decision in Applicant's case was not based solely on her status as a person who had received a discharge in bankruptcy. Furthermore, it was legally permissible for the Judge to take into account Applicant's 1993 bankruptcy when evaluating Applicant's overall history of financial difficulties under Guideline F. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 4 ("While a discharge in bankruptcy is intended to provide a person with a fresh start financially, it does not immunize an applicant's history of financial problems from being considered for its security significance.")

3. Whether the Administrative Judge failed to give due consideration to Applicant's employment history. Applicant refers to her employment history and the absence of any evidence that she has engaged in misconduct on the job, and asserts that her employment history should count for something. The Board construes Applicant's assertions as raising the issue of whether the Administrative Judge failed to give due consideration to Applicant's employment history.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted or overcome merely because an appealing party can cite to favorable record evidence that the appealing party believes should have been given more weight by the Judge. Therefore, Applicant's assertion that the record evidence about her employment record should have been given more weight by the Judge is not sufficient to rebut or overcome the presumption that the Judge considered that record evidence.

In any case, security clearance decisions are not limited to consideration of an applicant's employment record or conduct during duty hours. Indeed, conduct unrelated to an applicant's employment record or conduct during duty hours can raise security concerns. *See, e.g.*, ISCR Case No. 02-20947 (June 18, 2004) at p. 5. In this case, the record evidence provided the Administrative Judge with a rational basis for concluding that Applicant's overall history of financial difficulties raised security concerns under Guideline F, regardless of Applicant's employment record.

Finally, Applicant's disagreement with the Administrative Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed it in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable formal findings concerning SOR paragraphs 1.c and 1.d are not at issue on appeal.
2. Applicant's offer to re-submit documentation for the Board's consideration is not necessary. The documentation Applicant submitted for the Administrative Judge to consider in her case is in the case file, and is available for the Board to review in connection with this appeal.